



## **FACTUAL HISTORY**

This is the third appeal before the Board. In a February 5, 2009 decision, the Board affirmed as modified an OWCP decision dated June 12, 2008, finding that appellant sustained an eight percent permanent impairment of the left leg.<sup>2</sup> In a February 19, 2010 decision, the Board affirmed an OWCP decision dated March 26, 2009 finding that she had no more than eight percent impairment of the left lower extremity.<sup>3</sup> The facts and circumstances of the case are set forth in the Board's prior decision are incorporated herein by reference.

On January 11, 2011 appellant claimed a schedule award. OWCP obtained an impairment evaluation from appellant's attending physician on July 20, 2011. An OWCP medical adviser reviewed the report and opined that appellant had a total 22 percent impairment of the left leg.

By decision dated January 12, 2012, OWCP granted appellant a schedule award for a 14 percent permanent impairment of the left lower extremity. The decision stated that the period of the award was for 40.32 weeks, from July 20, 2011 to April 27, 2012. The record, however, indicates that OWCP continued to issue schedule award payments from April 28 to August 25, 2012. The decision was sent to appellant's address of record and not returned as undeliverable.

In a memorandum dated May 11, 2012, OWCP noted that appellant returned to part-time limited duty on May 24, 2010 after left knee surgery. Appellant was granted disability retirement on January 10, 2011. The employing establishment advised that she elected civil service retirement effective February 25, 2011.

In a September 10, 2012 OWCP telephone log, appellant notified OWCP that her schedule award did not end on April 27, 2012 but continued to be paid in error. She indicated that she was contacted by the Office of Personal Management and was told that her disability retirement was suspended while she was in receipt of compensation benefits. OWCP advised that appellant's compensation was stopped and that an overpayment would be calculated.

In OWCP compensation termination worksheet it was noted that appellant's compensation pursuant to a schedule award decision dated January 12, 2012 was to be terminated on April 28, 2012. However, appellant continued to be paid in error. The compensation worksheet noted that she was paid compensation from April 28 to May 5, 2012 in the amount of \$803.14 and from May 6 to June 2, 2012, June 3 to 30, 2012, July 1 to 28, 2012 and from July 29 to August 25, 2012 in the amount of \$2,811.00 for each period, for a total overpayment of \$12,047.14.

By notice dated September 21, 2012, OWCP advised appellant of its preliminary determination that an overpayment of \$12,047.14 occurred from April 28 to August 25, 2012 as

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<sup>2</sup> Docket No. 08-1825 (issued February 5, 2009).

<sup>3</sup> Docket No. 09-1485 (issued February 19, 2010).

OWCP paid compensation under for the schedule award after it expired on April 27, 2012.<sup>4</sup> It made the preliminary finding that appellant was at fault in creation of the overpayment as she accepted payments she knew or should have known to be incorrect. The January 12, 2012 OWCP decision clearly stated that the award expired on April 27, 2012. It afforded appellant 30 days to submit additional evidence and argument and to request a hearing.

In a September 27, 2012 letter, appellant requested a telephonic conference hearing regarding the overpayment. She advised that she received checks for the months of April 28 to August 25, 2012 but she asserted that she was at fault in the creation of the overpayment. Appellant indicated that she did not receive a letter informing her that the schedule award was to end in April 2012 and assumed that when she finished receiving her 14 percent schedule award OWCP would automatically stop payments. She indicated that the fault for the overpayment was with the claims examiner and that she was struggling financially. Appellant submitted income and expense information including mortgage statements, medical and utility bills. She submitted an overpayment questionnaire dated September 25, 2012, which noted zero in monthly household income and \$2,097.80 in monthly expenses. Appellant noted no cash or savings.

An October 30, 2012 memorandum of conference advised that a telephone conference was held that date. The memorandum included appellant's assertion that she never received the schedule award decision of January 12, 2012. She further asserted that OWCP was at fault because they did not stop the payment when scheduled. The claims examiner indicated that the schedule award decision was not returned to OWCP as undeliverable. He further noted that appellant last claimed wage-loss compensation on June 4, 2010.

In an October 30, 2012 memorandum to the file, the claims examiner indicated that appellant worked at the employing establishment until June 4, 2010. He noted that she was involved in a work incident in which she threatened the postmaster and supervisor and was advised not to return to work after June 17, 2010. The claims examiner noted that there was no evidence that appellant was terminated for cause and noted that she was approved for disability retirement on January 10, 2011. Also noted was that in claim number xxxxxx140 appellant elected retirement benefits effective February 25, 2011 and that in claim number xxxxxx473 she elected retirement benefits effective August 26, 2012.

By decision dated November 15, 2012, OWCP finalized the overpayment determination.<sup>5</sup> It further found that appellant was at fault in creation of the of \$12,047.14 which occurred from April 28 to August 25, 2012 overpayment as the January 12, 2012 decision stated that the schedule award expired on April 27, 2012 but she continued to deposit compensation checks through August 2012. As appellant was at fault, the \$12,047.14 overpayment was not subject to waiver. OWCP instructed her to send \$50.00 per month to OWCP for recovery of the overpayment.

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<sup>4</sup> *Supra* note 1.

<sup>5</sup> A decision was initially issued in error on October 30, 2012 as appellant was allowed 15 days to comment on the memorandum of conference. OWCP then issued the decision on November 15, 2012.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.<sup>6</sup> Section 8129(a) of FECA provides, in pertinent part, that when an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.<sup>7</sup> OWCP's procedure manual identifies various situations when overpayments of compensation may occur, including when a claimant receives schedule award compensation after the expiration of the award.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

Appellant claimed a schedule award for permanent impairment of the left lower extremity due to accepted lesion of the medial femoral condyle. On January 12, 2012 OWCP granted a schedule award for an additional 14 percent permanent impairment of the left leg. The decision specified that the period of the award ran from July 20, 2011 to April 27, 2012. However, OWCP continued payment from April 28 to August 25, 2012, after the schedule award expired.

The evidence reflects and appellant does not dispute that she received \$12,047.14 in compensation from April 28 to August 25, 2012. The Board therefore finds that OWCP correctly determined that she received an overpayment of compensation in the amount of \$12,047.14 for the period in question.<sup>9</sup>

### **LEGAL PRECEDENT -- ISSUE 2**

Section 10.433 of the implementing regulations provide that each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. Under the regulations, a recipient will be found to be at fault with respect to creating an overpayment if he or she has done any of the following:

- (1) made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect;
- (2) failed to provide information which he or she knew or should have known to be material; or

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<sup>6</sup> *Id.* at § 8102(a).

<sup>7</sup> Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.2 (May 2004).

<sup>8</sup> *Id.*

<sup>9</sup> *Alberto Pineiro*, 51 ECAB 310 (2000).

(3) accepted a payment which he or she knew or should have known was incorrect.<sup>10</sup>

Section 10.433(b) of OWCP's regulations provide, in relevant part, that the determination of fault depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

OWCP found that appellant was at fault in the creation of the \$12,047.14 overpayment because she accepted compensation payments that she knew or should have known to be incorrect.

The January 12, 2012 decision stated that the schedule award expired on April 27, 2012. OWCP continued to issue compensation checks from April 28 to August 25, 2012. Despite being informed that the schedule award had expired on April 27, 2012, appellant deposited these checks, totaling \$12,047.14, into her bank account. She accepted payments which she knew or should have known to be incorrectly issued after expiration of the schedule award. Therefore, OWCP properly found that appellant was at fault in creation of the overpayment. The fact that it may have been negligent in issuing the payments does not mitigate this finding.<sup>12</sup> Appellant asserts that she did not receive the January 12, 2012 schedule award decision and therefore was unaware that the award should have ended on April 27, 2012. The record supports that OWCP's January 12, 2012 decision was sent to her at the address of record and does not indicate that it was returned as undeliverable. Under the "mailbox rule," it is presumed, absent evidence to the contrary, that a notice mailed to an individual in the ordinary course of business was received by that individual.<sup>13</sup>

The Board notes that it does not have jurisdiction to review OWCP's determination that the overpayment would be recovered by repayment of \$50.00 per month. The Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>14</sup> Appellant is not in receipt of continuing compensation.

OWCP properly determined that appellant was at fault in the creation of the \$12,047.14 overpayment and therefore not entitled to waiver.

On appeal, appellant asserts that after the telephone prerecoupment hearing she submitted evidence within the 15-day time limit, which was not considered by OWCP prior to rendering its

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<sup>10</sup> 20 C.F.R. § 10.433(a)(3).

<sup>11</sup> *Id.* at § 10.433(b).

<sup>12</sup> *Id.* at § 10.435(a); *William E. McCarty*, 54 ECAB 525 (2003).

<sup>13</sup> *A.C. Clyburn*, 47 ECAB 153 (1995).

<sup>14</sup> *Judith A. Cariddo*, 55 ECAB 348, 353 (2004).

decision. She resubmitted this evidence on appeal. The Board notes that no additional evidence was received prior to the November 15, 2012 decision.<sup>15</sup> Additionally, the Board may not consider new evidence on appeal.<sup>16</sup>

**CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$12,047.14 for the period April 28 to August 25, 2012. The Board further finds that OWCP properly denied waiver of the overpayment.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 15, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 3, 2013  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>15</sup> See 20 C.F.R. § 501.2(c).

<sup>16</sup> *Id.* Subsequent to the filing of the appeal, appellant asked that claim number xxxxxx473 also be considered in the present appeal. She did not indicate this on her application for review filed on December 19, 2012. Appellant also does not explain how claim number xxxxxx473 is related to the current appeal which pertains to an overpayment of compensation. To the extent that appellant wishes to file a new appeal in claim number xxxxxx473, she has not identified a decision in that claim for which she seeks an appeal.